

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPERATING PROCEDURES

(As of December 1, 1998)

These are procedures for the court's internal operations. The court may dispense with their use in particular cases. Litigants acquire no rights under these procedures.

1. Motions

(a) *Number of Judges Necessary to Determine Motions*

(1) *Ordinary Practice.* At least two judges shall act on requests for bail, denials of certificates of appealability, and denials of leave to proceed on appeal in forma pauperis. Ordinarily three judges shall act to dismiss or otherwise finally determine an appeal or other proceeding, unless the dismissal is by stipulation or is for procedural reasons. Three judges shall also act to deny a motion to expedite an appeal when the denial may result in the mooted of the appeal. All other motions shall be entertained by a single judge in accordance with the practice set forth in paragraph (c). In the interest of expediting a decision or for other good cause, a fewer number of judges than provided in these procedures may decide any motion.

(2) *En Banc Requests.* If en banc consideration of a motion is requested, no more than the normal number of judges required for such a motion need act on it. If en banc reconsideration of the decision on a motion is requested, the motion will be considered by the same judge or judges who acted on the motion originally and, if and to the extent necessary to constitute a panel of three, one or more members of the motions panel. A judge may request that any motion be considered by the court en banc.

(b) *Selection of Judges to Determine Motions.* The responsibility to handle motions shall be rotated among the judges. If a single judge to whom a motion is presented orders a response, the motion and response will ordinarily be presented to the same judge for ruling.

(c) *Motion Practice.*

(1) *Motions That May Require Immediate Action.* A staff attorney will read upon filing the following motions (whether labeled emergency or not): (i) for bond; (ii) for injunction; (iii) for stay of injunction; (iv) for stay of an agency order; (v) to dismiss appeals not by agreement; (vi) for leave to appeal from an interlocutory order pursuant to 28 U.S.C. §1292(b); (vii) to stay or recall the mandate; (viii) to supplement the record; and (ix) all other emergency motions. If the motion requires immediate action, it will be taken to the motions judge and, if necessary, a panel. If it does not require immediate action, the staff attorney will wait up to ten days for a response to be filed before taking the motion to the motions judge or panel.

(2) *Routine Motions.* Routine motions (see subparagraph (7)) will be given to court staff who will read the motion and any affidavit in support thereof as well as any response to the motion. The designated staff member is then authorized, acting pursuant to such general directions and criteria as the court prescribes, to prepare an order in the name of the court either granting or denying the motion or requesting a response to the motion. If the designated staff member has any questions about what action should be taken, the motions judge will be consulted. Once a panel has been assigned for the oral argument or submission of an appeal, or after an appeal has actually been orally argued or submitted for decision without oral argument, the court staff should consult the presiding judge on motions that would otherwise be considered routine.

(3) *Nonroutine Motions.* A staff attorney shall read each nonroutine motion (see subparagraph (7)) and then present it to the motions judge, and if necessary, the motions panel. The judge or panel will then advise the staff attorney as to the decision and direct that an order be prepared accordingly. The staff attorney will then prepare the order. If the order states detailed reasons for the decision, the staff attorney will take the original of the order to the motions judge or one of the judges on the motions panel to read and approve. The same procedure will be followed whenever a judge asks to see the prepared order before it is released.

(4) *Duties of Clerk of Court.* When an order is in final form and ready for release, copies of the order will be reproduced and mailed to the litigants and to any other persons who are affected by the order, such as the district court clerk, the district judge, the United States Marshal, *et al.* The clerk will make certain that the language of the order is technically proper.

(5) *Automatic Reconsideration When Response Filed After Ruling.* If a response to a motion is properly filed after the court has ruled on the motion adversely to the respondent, the motion and response will be reconsidered and a new order stating this fact and ruling on the motion shall be issued.

(6) *Record Keeping.* The clerk shall keep a record of all orders by date of entry and also place a copy of each order in the file folder of the appeal.

(7) *Classification of Motions and Actions by Court.* Motions and actions of the court are classified for purposes of this paragraph as follows:

| Type | Classification |
|---|----------------|
| To extend time or to file instanter | Routine |
| To consolidate appeals | Routine |
| To hold briefing in abeyance | Routine |
| To expedite or schedule briefing (But see 1.(a) <i>supra.</i>) | Routine |
| To intervene as of right | Routine |
| To withdraw exhibits for preparation of a brief by counsel of record or party appearing <i>pro se</i> prior to case being scheduled for oral argument | Routine |

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| To listen to tapes of oral argument under supervision of the clerk's office | Routine |
| To withdraw as counsel in criminal cases when other counsel has filed or is simultaneously filing an appearance | Routine |
| To withdraw as counsel in civil cases | Routine |
| To correct error in the caption of a case | Routine |
| To withdraw a previously filed motion before the court has acted upon it | Routine |
| To file a deferred appendix | Routine (generally denied) |
| To dismiss appeal by agreement, except in cases to which panels have already been assigned. | Routine |
| To supplement record | |
| (if no objection) | Routine |
| (with an item before district court) | Routine |
| (with an item not clearly before district court) | Routine to deny with leave to renew after moving to correct record in district court pursuant to Fed. R. App. P. 10(e) |
| For leave to appeal in forma pauperis | |
| (if denied without prejudice to renewal after district court denial) | Routine |
| (if denied for any other reason) | Nonroutine |
| (if granted) | Nonroutine |
| For leave to file brief amicus curiae | Nonroutine |
| For leave to file oversized brief | Nonroutine |
| To stay or recall mandate | Nonroutine |
| For appointment of counsel | Nonroutine |
| To postpone oral argument | Nonroutine |
| For certificate of appealability | |
| (if denied) | Nonroutine |
| (if granted) | Nonroutine |
| For leave to commence second or successive collateral attack | Nonroutine |
| To dismiss, not by agreement | Nonroutine |
| For bond, injunction, or stay of injunction | Nonroutine |
| To reconsider any order of court (other than pursuant to subparagraph (5)) | Nonroutine |
| For leave to appeal from interlocutory order, pursuant to 28 U.S.C. §1292(b) | Nonroutine |
| All other motions | Nonroutine |

The following actions by the court shall be handled similarly to the stated procedures for routine or nonroutine motions:

| Type | Classification |
|---|-----------------------|
| Issuance of orders to show cause pursuant to Circuit Rule 31(c) and (d) | Routine |
| Discharge of rules to show cause under Fed. R. App. P. 31(c) and Circuit Rule 31(c) and (d) | Routine |
| (granting discharge) | Nonroutine |
| (denying discharge) | |
| Orders pursuant to Fed. R. App. P. 34 | Nonroutine |

(8) The clerk is authorized to reject repetitious motions to reconsider.

2. Titles and Precedence of Judges

(a) Except to the extent required by law, the court does not distinguish between judges in regular active service and senior judges with respect to title, precedence, and eligibility to participate in the court's decisions.

(b) Judges hold precedence in this sequence for the purpose of presiding at a session of the court: (1) Circuit Justice; (2) the Chief Judge of the circuit; (3) the judge of this circuit in regular active service with the greatest seniority according to the terms of 28 U.S.C. §45(b). Every panel includes at least one circuit judge in regular active service, so no further provision for the selection of a presiding judge is necessary.

(c) Subject to part (b) of this rule, judges have precedence and are listed on opinions in the following order: (1) Circuit Justice; (2) Chief Judge of the circuit; (3) Associate Justice (Retired); (4) Circuit Judges by seniority of commission (without distinction between judges of this and other circuits); (5) District Judges by seniority of commission.

(d) Clerk's office personnel will ensure that all orders and opinions comply with this rule. The Clerk's office also will ensure that the description of the panel is consistent and conforms to the appropriate model: "X, Chief Judge, and Y and Z, Circuit Judges"; "X, Y, and Z, Circuit Judges"; "X and Y, Circuit Judges, and Z, District Judge."

3. Issuance of Opinions

(a) When an opinion is ready for release, the author will send the opinion (together with any concurring or dissenting opinions) to the printer immediately.

(b) The Clerk's office will provide each writing judge with page proofs of the opinion. Each judge will review the proofs promptly. If within three business days the Clerk's office has not received a response, the Clerk will call to inquire about the status of the opinion.

(c) The Clerk's office will release the opinion immediately after receipt of the printed copies, unless the writing judge has asked the Clerk to delay release to permit the judge to check the corrected proofs against the printed opinion.

4. Inclusion of Costs [abrogated]

5. Hearings and Rehearings En Banc

(a) *Request for Answer and Subsequent Request for Vote.* If a petition for rehearing en banc is filed, a request for an answer (which may be made by any Seventh Circuit judge in regular active service or by any member of the panel that rendered the decision sought to be reheard) must be made within 10 days after the distribution of the en banc petition. If an answer is requested, the clerk shall notify the prevailing party that an answer be filed within 14 days from the date of the court's request. Within 10 days of the distribution of the answer, any judge entitled to request an answer, may request a vote on the petition for rehearing en banc.

(b) *Request for Vote When No Answer Requested.* Ordinarily an answer will be requested prior to a request for a vote. A request for a vote on the petition (which may be made by any judge entitled to request an answer) must be made within 10 days from the distribution of the petition. If a vote is so requested, the clerk shall notify the prevailing party that an answer to the petition is due within 14 days.

(c) *Notification to File Answer.* The judge who requests an answer pursuant to paragraph (a) or who requests a vote pursuant to paragraph (b) shall be responsible for having the clerk notify the prevailing party to file an answer to the petition.

(d) Voting.

(1) *Majority.* A simple majority of the voting active judges is required to grant a rehearing en banc.

(2) *Time for Voting.* Judges are expected to vote within 10 days of the request for a vote or within 10 days of the filing of the answer pursuant to the request for a vote, whichever is later.

(e) *Preparation of Order.* After the vote is completed, the authoring judge, or the presiding judge of the panel if the author is a visiting judge, will prepare and send to the clerk an appropriate order. Minority positions will be noted in the denial of a petition for rehearing en banc or the denial of a petition for rehearing unless the judges in the minority request otherwise. Minority positions will not be noted in orders granting a rehearing or rehearing en banc unless so requested by the minority judge. An order granting rehearing en banc should specifically state that the original panel's decision is thereby vacated.

(f) *Participants in Rehearings En Banc.* Only Seventh Circuit active judges and any Seventh Circuit senior judge who was a member of the original panel may participate in rehearings en banc.

(g) *Similar Procedures for Hearings En Banc.* Similar voting procedures and time limits shall apply for requests for hearings en banc except that a staff attorney may circulate such a request.

(h) *Distribution of Petitions.* Petitions for rehearing that do not suggest rehearing en banc are distributed only to the panel. Petitions for rehearing en banc are distributed to all judges entitled to vote on the petition.

6. Panel Assignments in Certain Cases

(a) *Remands from the Supreme Court.* A case remanded by the Supreme Court to this court for further proceedings will ordinarily be reassigned to the same panel that heard the case previously. If a member of that panel was a visiting judge and it is inconvenient for the visitor to participate further, that judge may be replaced by designation or by lot, as the chief judge directs.

(b) *Successive Appeals.* Briefs in a subsequent appeal in a case in which the court has heard an earlier appeal will be sent to the panel that heard the prior appeal. That panel will decide the successive appeal on the merits unless there is no overlap in the issues presented. When the subsequent appeal presents different issues but involves the same essential facts as the earlier appeal, the panel will decide the subsequent appeal unless it concludes that considerations of judicial economy do not support retaining the case. If the panel elects not to decide the new appeal, it will return the case for reassignment at random. If the original panel retains the successive appeal, it will notify the circuit executive whether oral argument is necessary. If oral argument is scheduled, any visiting judge will be replaced by a member of this court designated by lot. Cases that have been heard by the court en banc are outside the scope of this procedure, and successive appeals will be assigned at random unless the en banc court directs otherwise.

(c) *Successive Collateral Attacks.* An application for leave to file a second or successive petition under 28 U.S.C. §2254 or §2255 (see 28 U.S.C. §2244(b) and Circuit Rule 22.2) will be assigned to the panel that heard the prior appeal. If there was no appeal in the prior case, the application will be assigned to the current motions panel.

(d) *Certain Cases before Motion Panels.* When a motion panel decides that a motion or petition should be set for oral argument or the appeal expedited, it may recommend to the chief judge that the matter be assigned for argument and decision to the same panel. In the absence of such a recommendation, the matter will ordinarily be assigned in the same manner as other appeals.

7. Routine Action by the Clerk

(a) *Dismissal for Failure to Prosecute.* Statutes and rules of court call for the parties to take specified steps at particular times, and the court treats failure to take some of these steps as failure to prosecute, leading to dismissal. Failure to pay the docket fee, failure to file the docketing statement required by Circuit Rule 3(c), and failure by the appellant or petitioner to file a brief, amount to abandonment of the appeal.

(1) Seven days after the docket fee, docketing statement, or brief is due, the Clerk will send a notice, by certified mail, reminding the party of the obligation. The notice will inform the party about the consequence of continued delay in satisfying the obligation.

(2) If the party or counsel does not respond within 21 days of the date of the notice, the Clerk will enter an order dismissing the appeal for want of prosecution. In a criminal appeal with appointed counsel, however, the Clerk will not dismiss the appeal but will instead discharge the lawyer and appoint new counsel. When counsel is discharged under this procedure, the Clerk also will enter an order requiring the lawyer to show cause why abandonment of the client should not lead to disbarment.

(3) If the party responds within 21 days but does not comply with the obligation, or if the Clerk has not received a receipt showing delivery of the notice, a staff attorney will present the papers to the motions panel for decision.

(b) *Removal from the List of Attorneys Authorized to Practice.* States within the jurisdiction of this circuit send the court lists of attorneys who have been suspended from practice, disbarred, or resigned to prevent consideration of a pending ethical complaint. As a rule, these attorneys have had ample opportunity to contest that adverse action and do not oppose parallel action by other jurisdictions, leading to routine handling in this court.

(1) Promptly after learning that a member of this court's bar has been suspended for a year or more, has been disbarred, or has resigned from the bar of a jurisdiction in which the attorney is authorized to practice, the Clerk will send a notice, by certified mail, directing the lawyer to explain within 30 days why this court should not strike the lawyer from the roll of attorneys authorized to practice.

(2) If the lawyer does not respond within 30 days, or if the lawyer consents to the proposed disposition, the Clerk will enter an order removing the lawyer from the roll of attorneys authorized to practice in this court.

(3) If the lawyer responds within 30 days but does not consent to the proposed disposition, or if within that time the Clerk has not received a receipt showing delivery of the notice, a staff attorney will present the papers to the motions panel for decision.

(c) *Review of the Clerk's Action.* A petition for rehearing contesting the entry of a routine order under this operating procedure will be treated as a motion and referred to the motions panel. An order by the motions panel permitting the appeal to continue has the effect of reinstating the appeal, and the Clerk will reset the briefing schedule accordingly.

8. Multiple Appeals

When multiple parties to the same case have taken appeals, the court's senior staff attorney will review the docketing statements filed under Circuit Rule 3 and issue a scheduling order governing the filing of briefs.

When multiple appellants have the same or a closely related interest in the appeal, the senior staff attorney ordinarily will provide for the filing of a joint opening brief, with provision in appropriate cases for separate individual briefs to present points that do not concern all appellants. When the parties have filed cross appeals, the scheduling order usually will call on the party principally aggrieved by the judgment to file the opening brief. For example, when the judgment holds the defendant liable and the plaintiff's cross appeal concerns the amount of damages or an award of attorney's fees, the defendant normally will file the opening brief.

9. Presumptive Times for Action

Expedition preparation and release of opinions and orders is important not only to litigants ("Justice delayed is justice denied") but also to the operation of the court. Delay in the preparation of or response to opinions means that other judges must re-read the briefs and re-study the record in order to act conscientiously on their colleagues' drafts. Dispatch in circulating drafts and responding to a colleague's circulations therefore reduces duplicative work and improves the quality of justice. With these considerations in mind, the court establishes the following presumptive times for action, anticipating that in most cases judges will take less time but understanding that circumstances may make it imprudent to adhere to these norms mechanically. Every judge should, and may, take the time required for adequate study and reflection.

(a) A judge assigned to write a draft after a case has been identified at conference as suitable for disposition by a brief unpublished order should circulate the draft to the other members of the panel within 21 days of the date the case was argued or submitted.

(b) A judge assigned to write a published opinion should circulate the draft to the other members of the panel within 90 days of the date the case was argued or submitted. When the case is unusually complex, extended research is required, or other special circumstances apply, however, the writing judge may extend this time to 180 days by giving appropriate notice to the other members of the panel.

(c) Responding to drafts circulated by other judges is the first order of business. Every judge should respond—by approval, memorandum suggesting changes, or notice that a separate opinion is under active consideration—within 10 days of the circulation of a draft.

(d) As a rule, writing separate concurring or dissenting opinions takes precedence over all business other than initial responses to newly circulated drafts. Separate opinions should be circulated to the panel within 28 days after the initial response described in part (c) of this procedure.

(e) Once the opinion has issued, judges should act promptly on any further motions. In particular, members of the panel should vote within 10 days on any petition for rehearing. Under Operating Procedure 5, judges have 10 days to request a response to a petition for rehearing en banc, and 10 days to call for a vote on the petition once the response has been received. Once a judge has called for a vote, all other judges should register their votes within 10 days. Once this time (including extensions described below) has passed, and sufficient votes have been received to grant or deny the petition for rehearing or petition for rehearing en banc, the court will enter an order to that effect without waiting for additional responses.

(f) Each judge should establish a tickler system designed to ensure adherence to these norms. When one chambers does not receive a draft, vote, or response within the time presumptively established, secretaries or law clerks should inquire. This step not only catches communications lost in transmission but also serves as a backup reminder system.

(g) A judge who believes that additional time is required to permit full consideration should notify the other members of the panel to that effect. If the judge believes that more than 30 days (in the case of opinions) or 10 days (in the case of other actions), in addition to the time presumptively established by this procedure, is essential, the judge also should notify the chief judge of the delay and the reasons for it.

(h) The presiding judge of a panel should reassign the case if the judge initially assigned to draft the order or opinion has not circulated the draft within the time provided by parts (a) and (b) of this procedure, plus the extra time allowed by part (g), unless in consultation with the assigned author and the chief judge the presiding judge decides that reassignment would delay disposition still further.

(i) If two members of the panel have agreed on an opinion, and the third member does not respond within the time provided by part (c), or does not complete a separate opinion within the time presumptively established by parts (d) and (g), the writing judge should inquire of the third member whether a response is imminent. If further delay is anticipated, the majority should issue the opinion with a notation that the third judge reserves the right to file a separate opinion later.

(j) When the presumptive time for action established by this procedure is 10 days, the time may be extended on notice that a judge is unavailable to act on judicial business. The time specified by this notice is added to the time presumptively established by this procedure.